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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE TEXAS COURT OF CRIMINAL APPEALS AT AUSTIN, TEXAS

Reynaldo Lerma, Appellee
v.
The State of Texas

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DECISION BY THE THIRD COURT OF APPEALS IN CAUSE NO. 03-18-00194-CR

APPELLEE'S BRIEF

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Identity of Parties and Counsel

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Trial Judge:

Honorable Jack Robison
207th District Court, Hays County, Texas

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Statement of the Case

A Hays County District Judge dismissed a capital murder case against Lerma pursuant to the Texas Rule of Evidence 508 (TRE 508). (1 CR 81). The State appealed the trial court's dismissal, and the Third Court of Appeals reversed the trial court's dismissal. Lerma's motion for rehearing and motion for en banc consideration were denied by the Third Court of Appeals. This Court granted Appellee's Petition for Discretionary Review on December 12, 2019, in PD-0075-19.

Issues Presented for Review

1. **Can an appellate court disregard the issue of error preservation so that the State has a remedy when a capital murder case is dismissed because of the State's own actions in disappearing a confidential informant?**

2. **Can an appellate court reverse a trial court's dismissal under TRE 508 without ever addressing the untrustworthiness of the State's position that the State does not know the identity of the confidential informant?**

ARGUMENT

Statement of the Facts

On September 16, 2015, a Hays County Grand Jury returned an indictment charging the Appellee, Reynaldo Lerma, with Capital Murder. (1 SCR 4). Lerma was one of six co-defendants charged with capital murder under party theory; an additional co-defendant was charged by information

only for the offense of robbery. (1 SCR 3)[1]. The actual shooter was not Lerma or any of Lerma's co-defendants, but the deceased's roommate, who the deceased was selling and manufacturing drugs with. (1 SCR 3); (7 RR 16-17). Neither Lerma, nor any of his co-defendants ever fired a weapon during the alleged offense, and the actual shooter was never charged with a criminal offense. (1 SCR 3).

The State provided in initial discovery an offense report from the Hays County Narcotics Task Force (HCNTF) detailing a controlled buy close in time to the alleged offense, in which a confidential informant purchased narcotics from the deceased. (1 SCR 3). After several pretrial hearings and discussions on the record, the State made it abundantly clear in open court that the State did not know if there was any exculpatory or mitigating evidence contained within the HCNTF files regarding the controlled buy. (2 RR 14-19; 5 RR 6-14). Therefore, the Defense requested that they be allowed to review the entire HCNTF file regarding the controlled buy, as well as the confidential informant's file, in order to ascertain if there was any exculpatory or mitigating evidence. (2 RR 14-19; 5 RR 6-14).

The trial court ordered that Lerma's counsel be able review the HCNTF

[1] A Supplemental Clerk's Record was filed, so as to include the trial court's findings of fact and conclusions of law as part of the appellate record. Appellee cites to this as SCR.

file under a gag order, making clear that the court was not ordering the identity of the confidential informant be disclosed under TRE 508, only that the attorneys representing Lerma be given an opportunity to review the file, as they were better situated than the trial court to ascertain if the file contained any exculpatory or mitigating information. (5 RR 6-14); (1 CR 11). However, instead of simply allowing the Defense to view the file for the limited purpose of determining if the file contained any exculpatory or mitigating evidence, the State invoked TRE 508, and mandamused the trial court's order to the Third Court of Appeals. *In Re Wesley Mau*, No. 03-17-00424-CV (Tex.App.—Austin 2017).

In the State's petition for mandamus, the State requested that the trial court be required to hold an *in camera* hearing under TRE 508 to determine whether or not a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence. (1 CR 75; 1 SCR 4). The Third Court of Appeals denied the State's petition for mandamus, and the State filed a petition for mandamus with this Court. *In re State of Texas ex rel. Wesley Mau*, WR-97, 101-01 (Tex.Crim.App. 2017).

On July 27, 2017, the trial court conducted an *in camera* hearing based on an agreement with the State that if the trial court conducted the hearing,

the State would then withdraw its petition for mandamus before this Court. (7 RR 79-80); (1 SCR 4). During the hearing, two members of the HCNTF and the Commander of the HCNTF claimed that they allegedly did not know the identity of the confidential informant. (1 SCR 7).

Teddy Grabarkewitz, a detective with the HCNTF, testified that he was a detective for 19 years, and that the confidential informant knew the deceased and had a relationship with the deceased. (1 SCR 5). Detective Grabarkewitz further testified that it was very possible that the confidential informant knew the deceased's roommates as well, including Andrew Alejandro, the only person who ever fired shots the evening of the alleged offense, shooting the deceased multiple times. (1 SCR 5). Additionally, Detective Grabarkewitz testified that the confidential informant could have informed Mr. Alejandro of the controlled buy that occurred between the deceased and the confidential informant. (1 SCR 6).

Wade Parham, the Commander of the HCNTF, testified that he had a duty to review and approve all reports and documents prepared by his subordinates, and failed to do so in this case. (1 SCR 6). Commander Parham further testified that at the time that he signed his sworn affidavit invoking the confidential privilege, that he could not recall if he was aware that the HCNTF actually did not know the identity of the confidential

informant, and conceded that this testimony was illogical. (1 SCR 6). More importantly, Commander Parham testified that he understood how the identity of the confidential informant could potentially be exculpatory in Mr. Lerma's case. (1 SCR 6).

Lenny Martinez, a Detective with the HCNTF, testified that the deceased's roommate, and the shooter in the case, was a drug dealer. (1 SCR 6). Detective Martinez further testified that the identity of the confidential informant could very well provide evidence proving that Mr. Lerma was innocent, and that it was possible that the deceased was an informant for the HCNTF. (1 SCR 6).

All the members of the HCNTF testified that they violated Section 27 of the HCNTF policies and procedures, by allegedly failing to document the confidential informant, and allegedly failing to create a file for the confidential informant. (1 SCR 7). All the members of the HCNTF testified that they violated their policies and procedures by allegedly failing to have a file coded with an assigned informant number that would contain the report of the investigation establishing the confidential informant, their personal history, RCIC/NCIC check for warrants, Driver License check, CCH, photograph of the informant, a signed agreement, and activity log of case work. (1 SCR 6). All the members of the HCNTF testified that they

violated their policies and procedures by allegedly failing to document whether or not the confidential informant was willing to testify in any or all judicial proceedings. (1 SCR 7). All the members of the HCNTF testified that they violated their policies and procedures by allegedly failing to document the expenses resulting from the controlled buy. (1 SCR 7). The record further reflects that the District Attorney was made aware of the fact that the HCNTF allegedly did not know the identity of the informant prior to the District Attorney seeking mandamus relief from the Third Court of Appeals under the guise of TRE 508. (7 RR 60).

At the conclusion of the *in camera* hearing, the trial court ruled that under TRE 508, a reasonable probability exists that the confidential informant could give testimony necessary to a fair determination of guilt or innocence. (1 SCR 5). The State did not object to the court's finding pursuant to TRE 508, and to the contrary stated on the record that the State was satisfied that the trial court had conducted the *in camera* hearing pursuant to the framework of the Texas Rule of Evidence 508. (7 RR 79-80).

On November 28, 2017, the Defense filed a motion requesting that Lerma's charge be dismissed pursuant to TRE 508. (1 CR 14). The Defense claimed that under TRE 508(c)(2)(A)(i), the trial court was mandated to

dismiss the case, as the trial court made the finding that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence, and the State in turn elected to not disclose the informer's identity. (1 CR 14).

On December 4, 2017, a hearing was held regarding the Defense's motion to dismiss, in which the focus of the argument was whether or not the State had "elected" to not disclose the identity of the informant. (9 RR 1-29). The trial court made clear his grave concerns about the veracity of the State's position that the State allegedly did not know the identity of the informant, and requested the parties to brief the issue so that the court could make an informed decision. (9 RR 7-9; 19-27).

On December 14, 2017, the State inadvertently provided the Defense an email between the District Attorney and Commander Parham dated August 19, 2016, one day after the first pretrial hearing discussions relating to the confidential informant occurred. (2 RR 13-19); (1 SCR 3). In this email, Commander Parham states to Mr. Mau in regards to the Defense's inquiries, "And just in case he asks, I'm not going to reveal which informant made the purchase from Espino in case TF15-033. It wasn't anyone involved in the homicide." (1 CR 57); (1 SCR 3). The next day, December 15, 2017, the Defense filed an amended Motion to Dismiss, alleging that the email

correspondence clearly shows that the State made an election to not disclose the informant under TRE 508, as the language of the email unambiguously establishes that Commander Parham knows the identity of the informant. (1 CR 53).

On March 26, 2018, the trial court dismissed the case against Lerma as mandated under the Texas Rule of Evidence 508 (c)(2)(A)(i). (1 CR 81). The trial court articulated in its findings of fact and conclusions of law that, "Ultimately, all members of the HCNTF testified during the in camera hearing that they do not know the identity of the CI; the Court finds this testimony to lack credibility, and to be inconsistent with other testimony and exhibits in the case. After the State claimed the CI privilege and sought extraordinary relief up to The Court of Criminal Appeals to protect the identity of the CI (known only to the state), the State now claims they do not know the identify of the CI. The State's inconsistent position of protecting a privileged CI, and then claiming to not know the identity of the CI casts doubt on the reliability and credibility of the State's witnesses." (1 SCR 7). Further, the trial court concluded that the State had elected to not disclose the identity of the informant. (1 SCR 3).

Summary of The Argument

First, Lerma would contend that error preservation is a two-way street,

and that courts of appeals should not summarily refuse to address the issue of error preservation in order to create a favorable outcome for the State. Error preservation is the constant and reliable drumbeat of our judicial system, in which all parties must dance to the same tune. However, in its opinion, the Third Court of Appeals explicitly failed to address the issue of whether or not the State preserved error for appellate review regarding the basis for the Third Court's reversal, that the trial court abused its discretion in finding that the informer can give testimony necessary to a fair determination of guilt or innocence. Instead the court of appeals merely suggested in a footnote that the record reflects that the State did preserve error on the issue *if* the court were to address the issue. However, the court's reading of the portion of the record relied upon in making this claim is inaccurate, and in actuality only serves to bolster Lerma's assertions that error was waived on the issue. For, the State's objection relied upon by the court of appeals to support error preservation is actually the State objecting to the trial court's **refusal** to make the finding that the informer can give testimony necessary to a fair determination of guilt or innocence, despite the insistence by the State that the court make the finding. Therefore, the reference to the record by the court of appeals is not only faulty, but also illogical to validate the court of appeals reversal of the trial court's dismissal

based on the trial court abusing its discretion in making the finding that the informer can give testimony necessary to a fair determination of guilt or innocence.

Additionally, the court of appeals, within the same footnote, also seems to suggest that because the State objected to the ultimate dismissal of Lerma's case, eight months after the finding was made that was the basis for the court of appeals' reversal, that this objection potentially preserves the issue of the initial finding for appellate review. However, the court of appeals' insinuation contradicts all the legal precedent that analyzes error preservation, as the record is unambiguous that the State never made a timely or specific objection to the finding that was the basis of the Third Court's reversal. To the contrary, the record is clear that the State, through its actions in mandamusing the trial court, essentially compelled the trial court to hold the *in camera* hearing so that the trial court could make the finding that the informer can give testimony necessary to a fair determination of guilt or innocence. Lerma contends that a thorough reading of the record below unequivocally leaves the impression that the State was satisfied that the trial court made the finding in question, since the State was not only persistent in seeking that the finding be made, but was actually the only party on the record to ever even request that such a finding be made.

The trial court's decision to dismiss the charges against Lerma was not a rash or hasty decision, and the record reflects that the State was given more than ample opportunity to properly preserve the issue of the trial court's finding for appellate review. However, the State's briefings before the trial court centered the argument before the trial court on whether or not the State made an "election" under TRE 508, and never once stated that the trial court abused its discretion in making the finding that the informer can give testimony necessary to a fair determination of guilt or innocence.

Mr. Lerma would contend that the State never gave notice to the trial court or the Defense that the State believed the trial court abused its discretion in making the finding, because the State assumed that its deceptive strategy in claiming to not know the identity of the informant would prevent an ultimate dismissal, as the trial court could not possibly find that the State "elected" to not disclose the informant under TRE 508. However, the State inadvertently sent the email to Lerma proving that the State really did know the identity of the informant and was intentionally not disclosing such to the trial court, essentially defeating the State's duplicitous arguments.

Ultimately, in regard to the issue of error preservation, what is good for the goose, is good for the gander. If the trial court made the reverse finding,

that a reasonable probability did **not** exist that the informer can give testimony necessary to a fair determination of guilt or innocence, and Lerma did not object to the court making the finding, there is no question that Lerma would be barred from presenting this issue on appeal. The State of Texas should be held to the same standard, and should be prohibited from presenting an issue on appeal that it has patently forfeited.

However, even if the Court were to find that the State did preserve error on the issue that is the basis for the court of appeals' reversal, Lerma would contend that the court of appeals should not have reversed the trial court's dismissal under TRE 508 without addressing the untrustworthiness of the State's position that the State does not know the identity of the confidential informant. Lerma's case is an issue of first impression, in that the State, not the Defense, demanded an *in camera* hearing, and then during that hearing claimed that the State did not have any privileged information, as the State did not know the identity of the confidential informant. There is very little jurisprudence where trial courts have actually dismissed cases under TRE 508. However, there has never been a case dismissed under TRE 508 where the identity of the confidential informant was allegedly unknown to the State.

The Honorable Judge Jack Robison, is a seasoned district court judge, who coincidentally is also a former narcotics officer. Therefore, the trial court was uniquely situated to act as the fact finder in Lerma's case that involves narcotics officers and informants, and where the State was being deceptive in their tactics. The case law is abundantly clear that courts of appeals are to defer to the discretion of trial courts, especially when credibility is an issue, and must further consider the entirety of the record in doing such. However, the Third Court of Appeals supplanted the judgment of the trial court, without ever once addressing the insincerity of the State's claim that the State does not know the identity of the informant. The Third Court of Appeals should not be able to just turn a blind eye to the fact that the record reflects that the trial court, the trier of fact, did not believe that the State did not know the identity of the informant. The record is clear that the trial court's opinion of the State's credibility was integral to the trial court making the finding in question, and therefore this should, at the very least, be taken into consideration before finding that the trial court abused its discretion.

Simply put, the State's position is disingenuous. For, if the HCNTF file truly did not exist, and the State genuinely believed that the confidential informant was not pertinent to Lerma's case, the only logical conclusion to

make is that the State would have simply informed the trial court of the HCNTF's malfeasance instead of mandamusing the trial court, and ultimately risking a dismissal of a capital murder case. This is especially true here, where the record reflects that the State was fully aware that the State allegedly did not know the identity of the informant before the State petitioned for mandamus relief, and set into motion the very precise framework of TRE 508.

The Texas Legislature recognized that the great power of the State in being able to utilize secret witnesses as a tool of law enforcement should not come without consequences when enacting TRE 508; this is precisely why the shield of TRE 508 also comes with a sword. The shield of TRE 508 was properly pierced in Lerma's case, yet the court of appeals chose to bury the sword. In a climate where Narcotic Taskforces throughout our State have been exposed with systematic corruption regarding the use of confidential informants, Mr. Lerma respectfully urges the Court to send a message to rogue Narcotics Taskforces throughout the State of Texas that they can no longer operate outside the clear constraints of the law when utilizing confidential informants, and that trial courts will be accorded the proper discretion in evaluating their credibility.

Issue One

The Third Court of Appeals reversed the trial courts dismissal on the basis that the trial court abused its discretion in making the finding that the informer could give testimony necessary to a fair determination of guilt or innocence. *State v. Reynaldo Lerma*, NO. 03-18-00194-CR (Tex.App.—Austin 2018, pet. pending). However, the record reflects that the State never made a timely or specific objection to the trial court's finding that the informer could give testimony necessary to a fair determination of guilt or innocence. (7 RR). Lerma urged the court of appeals to disregard the State's argument on appeal regarding the finding because the State waived the issue for appeal, however the Third Court of Appeals summarily refused to address the issue of error preservation before reversing the dismissal. *Id*.

This Court has made clear that it is the duty of an appellate court to ensure that a claim is preserved in the trial court before addressing its merits. *Wilson v. State*, 311 S.W.3d 452, 573 (Tex.Crim.App. 2010). Additionally, issues of error preservation are systemic in first-tier review courts, and therefore appellate courts **must** review issues regarding error preservation, even if the parties do not raise the issue. *Gibson v. State*, 383 S.W.3d 152, 156 (Tex.Crim.App. 2012); *Darcy v. State*, 488 S.W.3d 325, 327-28 (Tex.Crim.App. 2016).

The record reflects that at the conclusion of the *in camera* hearing conducted on June 27, 2017, the trial court held, for the first time, that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence. (7 RR 79). The record is completely void of the State making any specific or timely objection to the finding, either orally or in writing, and actually reflects that the State was satisfied that the trial court conducted the hearing and made the finding. (7 RR). Moreover, the record as a whole further bolsters the logic that the State was content with the trial court's ruling, as the State, not Lerma repeatedly and aggressively sought the trial court to make the finding. (1 CR 75; 1 SCR 4); (7 RR 79-80).

After an over four-month period passed from the trial court making the finding that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence, the trial court conducted the next contested hearing, and the State still never made a sufficiently specific objection regarding the trial court's finding that would alert the trial court or the Defense that the State was objecting to the finding. (9 RR).

In spite of the State's failure to object to the finding, language contained in footnote five of the court of appeals' opinion seems to suggest

that the State did not have to make a specific and timely objection to the trial court's finding that a reasonable probability exists that the confidential informant could give testimony necessary to a fair determination of guilt or innocence, to preserve the issue for appeal, because the State's objection eight months later to the ultimate dismissal somehow encompassed the issue of the initial finding for appellate purposes. *State v. Reynaldo Lerma*, NO. 03-18-00194-CR (Tex.App.—Austin 2018, pet. pending). Specifically, the footnote states that:

> "Lerma contends on appeal that the State waives any complaint it may have about the trial court's finding that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence because the State failed to object to this finding. However, Lerma cites no authority indicating that the State was required to object to this specific finding apart from appealing the court's dismissal order." *Id*.

However, this insinuation of the Third Court of Appeals not only contradicts the Texas Rule of Appellate Procedure 33.1, but the entirety of the legal precedent analyzing this fundamental rule. Tex. R. App. P. 33.1; *Wilson v. State*, 311 S.W.3d 452, 573 (Tex.Crim.App. 2010); *Gibson v. State*, 383 S.W.3d 152, 156 (Tex.Crim.App. 2012); *Darcy v. State*, 488 S.W.3d 325, 327-28 (Tex.Crim.App. 2016).

Rule of Appellate Procedure 33.1 states that to present "a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request that stated the grounds for the ruling that the

complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." Tex. Rules App. Proc. 33.1(a)(1)(A). At its core, the concept of error preservation is simple: "The complaining party must let the trial judge know what she wants and why she thinks she is entitled to it, and do so clearly enough for the judge to understand and at a time when the trial court is in a position to do something about it." *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex.Crim.App. 2014). Further this Court explained that, "Requiring a party to object gives the trial court or the opposing party the opportunity to correct the error or remove the basis for the objection." *Id*. at 299.

Additionally, as Judge Campbell so aptly explained:

> "There are many rationales for this raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to the trial court; that fairness to all parties requires a litigant to advance his complaints at a time when there is an opportunity to respond to them or cure them; that reversing for error not raised in the trial court permits the losing party to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a trial court it erred when it was never presented with the opportunity to be right. The principle rationale for the rule, however, is judicial economy. If the losing side can obtain a reversal on a point not argued in the trial court, the parties and the public are put to the expense of a retrial that could have been avoided by better lawyering. Furthermore, if the issue had been timely raised in the trial court, it could have been resolved there, and the parties and the public would have spared the expense of an appeal."

Young v. State, 826 S.W.2d 141, 149 (Tex.Crim.App. 1991) (Campbell, J., dissenting).

This Court has further stated that "this 'raise it or waive it' forfeiture rule applies equally to goose and gander, State and defendant." *Martinez v. State*, 91 S.W.3d 331, 335-36 (Tex.Crim.App. 2002). However, Lerma would contend that if the opposite ruling occurred below, and the trial court, after conducting the *in camera* hearing, made the finding that the confidential informant could **not** provide testimony necessary to a fair determination of guilt or innocence, and Lerma did not timely object, that Lerma would unquestionably have forfeited this issue for appellate purposes. *Id*. Mr. Lerma would respectfully urge the Court to focus on the basic concept that error preservation is a two-way street when analyzing the issue at hand, for if Mr. Lerma would have waived the issue for appeal under the same circumstances, then so did the State. *Id*.

Further, it was the State's responsibility under the principle of "party theory" to apprise Mr. Lerma and the trial court of the nature of the complaint. *Martinez v. State*, 91 S.W.3d 331 (Tex.Crim.App. 2002). As expressed by the Court in *Martinez v. State*, when analyzing the issue of error preservation, "[it] is not whether the appealing party is the State or the defendant, or whether the trial court's ruling is legally 'correct' in every

sense, but whether the complaining party on appeal brought to the trial court's attention the very complaint that party is now making on appeal." *Id*. at 336. Here, Counsel for Lerma was never given the opportunity to respond to the State's objections regarding the trial court's finding, because the State did not timely or with specificity object to the finding. *Id*. This prejudiced Lerma twofold, because not only was Lerma not able to supplement the record and correct any error for appellate purposes regarding the trial court's finding, but more importantly, the trial court was unable to effectively articulate the basis for its finding, because the trial court was under the impression that the State did not oppose the finding. *Id*. This is evidenced by the court's findings of facts and conclusions of law, for if the trial court was aware that the State was objecting to the finding, the trial court could have better explained the basis for such. (1 SCR 3-8). Instead, the court's findings of facts and conclusions of law focused on rationalizing the issues that were presented by the State in the State's briefings before the court, such as the issue of an "election" on behalf of the State to warrant a dismissal. (1 SCR 3-8). Lastly, it is important to note that the trial court gave the State more than ample opportunity to alert the court and the Defense to any error in dismissing the case, as the record indicates that the trial court requested briefing on the issue of dismissal numerous times over a

period of several months (9 RR 7-9; 19-27); (11 RR 4). In this case, the State simply forfeited the argument that was the basis for the court of appeals reversing the trial court's decision, as the State failed to properly alert the parties to the issue. *Id*.

In *Douds v. State*, the Court addressed the issue of error preservation in regard to an exigent circumstances blood draw during a driving while intoxicated case. *Douds v. State*, 472 S.W.3d 670 (Tex.Crim.App. 2015). In *Douds*, the Defendant made isolated statements globally asserting that a blood draw was conducted without a warrant, and the Court concluded that the Defendant's statements were not sufficient to apprise the trial court of the appellate argument regarding exigent circumstances to allow a warrantless blood draw. *Id*. at 674. In *Douds*, the Court stated that "as regards specificity, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Id*. In Lerma's case, the trial judge made the finding that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence, and at that time the State did not object. (RR 7). Everything on the record leading up to the *in camera* hearing,

indicated that the State, not the Defense, was requesting that the finding be made. (1 CR 75; 1 SCR 4); (7 RR 79-80). Four months later, during a pretrial hearing, the State still did not object to the finding, and centered the State's arguments regarding a dismissal on whether or not the State made an "election" under TRE 508. (9 RR). The State then briefed the issue for the trial court, and did not cite a single case in its briefings to communicate to the trial court that the trial court had abused its discretion in making the initial finding, again concentrating the State's arguments on whether or not the State made an "election." (1 CR 58-71). In fact, the State's fourteen-page Trial Brief on Defendant's Motion to Dismiss Pursuant to TRE 508 never once states that the trial court abused its discretion in making the finding that was the basis of the reversal by the Third Court of Appeals. (1 CR 58-71).

Lerma's case is extremely similar to *Douds*, where the briefing before the trial court also did not address the issue on appeal. *Id*. Because all of the State's briefing before the trial court in the case at hand centered on the issue of whether or not an election was made by the State, not on the original finding triggering the mandatory dismissal within TRE 508, Lerma would ask the Court to follow the rationale in *Douds* and hold that error was waived by the State on the issue that was the basis of the reversal. *Id*.

Similarly, In *Pena v. State*, the Court discussed error preservation, but in the context of the federal standard of due process versus our Texas standard of due process. *Pena v. State*, 285 S.W.3d 459 (Tex.Crim.App. 2009). Ultimately, the Court held that the defendant in *Pena* did not preserve his Texas due course of law provision claim, because he failed to argue that it provides greater protection than the federal due process clause. *Id*. at 464. In *Pena*, the defendant actually did invoke the Texas due course of law provision, but the Court still reasoned that because the record showed that the trial judge and the State understood Pena's complaint to be under the federal standard, that Pena had failed to preserve error with regard to the Texas due course of law provision. *Id*. Here, unlike *Pena*, an objection to the trial court's finding that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence was never made. (7 RR). Therefore, Lerma would urge the Court to apply the reasoning in *Pena* to the case at hand, and hold that the State waived the issue for appeal, as the context in which the State's ultimate objection was made reveals that the trial judge and Lerma's understanding at that time was that the State was objecting to the dismissal based on the issue of the State not electing to disclose the informant. *Id*.

Additionally, Lerma would urge the Court to consider the State's

contradictory actions below when considering Lerma's claim that the State forfeited its right to appeal the finding. The record reflects that the State failed to object to the finding after repeatedly demanding that the *in camera* hearing occur and the finding be made. (7 RR). More importantly, instead of properly preserving error, the State attempted to create a loophole within TRE 508, in which the trial court's finding would essentially be moot, because there was allegedly no confidential informant to disclose, and therefore no "election" under TRE 508 to not disclose on the part of the State. (1 CR 58-71). However, before the trial court ruled on the defense's motion to dismiss based on that issue, an email was inadvertently disclosed to the defense that affirmatively showed that the HCNTF knew the identity of the CI and was intentionally not disclosing this identity, effectively closing the loophole the State was attempting to create. (2 RR 13-19); (1 SCR 3). Lerma would maintain that the only genuine contention driven by the State throughout the record below was whether or not the HCNTF "elected" to not disclose the CI, and that the State should not be rewarded for failing to make a timely and specific objection because they opted to chose a deceptive strategy. (2 RR 13-19); (1 SCR 3).

Moreover, the court of appeals' references to the record do not accurately reflect what transpired below. *State v. Reynaldo Lerma*, NO. 03-18-

00194-CR (Tex.App.—Austin 2018, pet. pending). In footnote five, the court of appeals states:

"Moreover, even assuming, without deciding, that the State was required to object to this finding, we conclude that it did so with sufficient specificity to alert the trial court to its complaint. At the June 2017 hearing, the trial court found "that the confidential informant can give testimony necessary for guilt or innocence." The prosecutor states, "Note our exception, please, Your Honor." The trial court responded, "Except all you want, Counselor. You know where the appellate court is." *Id*.

The court of appeals also states in the "background" portion of its opinion that:

"At a hearing in June 2017, the trial court clarified that it was finding that the CI could give testimony necessary to a fair determination of guilt or innocence. The prosecutor stated, "Note our exception please, Your Honor." The trial court responded, "Except all you want, Counselor. You know where the appellate court is." *Id*.

However, the trial court never made the finding that the confidential informant could provide testimony necessary to a fair determination of guilt or innocence during the June 19, 2017 hearing referenced above. (6 RR). It was only after the conclusion of *in camera* hearing, which occurred on July 27, 2017, more than a month after the hearing relied upon by the Third Court of Appeals, that the trial court ever articulated this finding. (6 RR); (7 RR). To clarify, the State's objection during the June 2017 hearing, referenced by the court of appeals, was because the trial court would **not** make the finding that the confidential informant could give testimony necessary for guilt or

innocence as requested by the State, and the trial court declined to include that language in the Defense's order to view the HCNTF file. (6 RR 4-5). This is evidenced not only by the actual order signed by the trial court during the June hearing that intentionally excluded the language that the confidential informant could give testimony necessary to guilt or innocence, as requested by the State, but by an email correspondence between the State and Counsel for the Defense, in which the State asks Counsel for the Defense to amend the proposed order to include the language that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence. (1 CR 6, 10).

Additionally, when the trial court states during the June hearing that, "I am not going to argue with that again, is this what you want," the trial court was first instructing the State that the court was not going to make the finding that the confidential informant can give testimony necessary to a fair determination of guilt or innocence, and was not going to entertain arguments on that issue again, and second, the trial court was clarifying with the Defense that the Defense wanted the trial court to sign the order prepared by Lerma that intentionally did not include the language of TRE 508. (6 RR 5). When the State asserts, "note our exception, please, Your Honor," the State was objecting to the fact that the trial court would **not** make the finding

that the confidential informant could give testimony necessary for guilt or innocence before allowing Lerma's counsel to review the HCNTF file, or include that language in the order. (6 RR 5).

Moreover, it is undisputed that after the trial court signed the order that specifically did not include the finding requested by the State, that the State then asserted the confidential informant privilege and filed petitions for writ of mandamus before the Third Court of Appeals and this Court, arguing that the trial court must hold an *in camera* hearing to make the finding of whether or not a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence. (1 CR 75; 1 SCR 4); *In Re Wesley Mau*, No. 03-17-00424-CV (Tex.App.—Austin 2017). Obviously, if the trial court had actually made the finding that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence during the June 2017 hearing, as stated by the court of appeals, it follows that the State would not have filed a Petition for Writ of Mandamus seeking that exact relief. *Id*.

In order to maintain the integrity and efficiency of our judicial system, Lerma would urge the Court to reverse the Third Court of Appeals opinion, as the State's complaint before the Third Court of Appeals did not comport with the complaint made to the trial court below. In the alternative, Lerma

would ask the Court to remand the case to the Third Court of Appeals and instruct the Third Court of Appeals to rule on the issue of error preservation.

Issue Two

Lerma contends that the duplicity of the State exposed in the record below is enough for the trial court to hold that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence. (1 SCR 7). For, the fact that the State's witnesses were untruthful in their testimony regarding their alleged lack of knowledge regarding who the confidential informant was, bolsters the rationality of the trial court's finding, as the sole finder of fact, that the confidential informant could provide testimony necessary to a fair determination of guilt or innocence consistent with Lerma's theory. *Id*. The trial court's finding constituted a legitimate exercise of discretion, as the logical inference made by the trial court was that if the State would go to such great lengths as to lie about their knowledge of the identity of the confidential informant, after aggressively invoking the 508 privilege, then the confidential informant must be able to provide testimony necessary to a fair determination of guilt or innocence. *Id*.

As this Honorable Court is aware, the decision about whether or not to order disclosure of an informant's identity under TRE 508 lies within the

sole discretion of the trial court. *Taylor v. State*, 604 S.W.2d 175, 179 (Tex.Crim.App. 1980). Additionally, unless the trial court's ruling is so clearly wrong as to lie outside the zone of reasonable disagreement, it must be affirmed. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex.Crim.App. 1990). The decision so falls outside that zone of reasonable disagreement when it is arbitrary, unreasonable, or fails to comport with any guiding rules or principles. *Id*. Additionally, court of appeals cannot substitute their judgment for that of the trial court; rather, appellate courts must decide whether the trial court's decision was arbitrary or unreasonable. *Id*. Moreover, as this Court emphasized in *Crain v. State*, when applying the abuse of discretion standard:

> "The trial court is given almost complete deference in its determination of historical facts, especially if those are based on an assessment of credibility and demeanor. The same deference is afforded the trial court with respect to its rulings on application of the law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of credibility and demeanor." *Crain v. State*, 315 S.W.3d 43, 48 (Tex.Crim.App. 2010).

Despite the immense deference that is to be afforded to a trial court when an evaluation of credibility is implicated, the Third Court of Appeals' opinion never once addresses the fact that at the time the finding in question was made by the trial court, that the trial court firmly believed that the State's witnesses were being dishonest that the State did not know the

identity of the informant. *Id*. The trial court made this abundantly clear in its findings of fact and conclusions of law when declaring that:

> ”Ultimately, all members of the HCNTF testified during the in camera hearing that they do not know the identity of the CI; the Court finds this testimony to lack credibility, and to be inconsistent with other testimony and exhibits in the case. After the State claimed the CI privilege and sought extraordinary relief up to The Court of Criminal Appeals to protect the identity of the CI (known only to the state), the State now claims they do not know the identity of the CI. The State's inconsistent position of protecting a privileged CI, and then claiming to not know the identity of the CI casts doubt on the reliability and credibility of the State's witnesses." (1 SCR 7).

Additionally, during the *in camera* hearing, the trial court made the following statements regarding the implausibility of the State's position that the State did not know the identity of the informant:

> "THE COURT: You believe this man? You believe this is true? You believe they are telling you the truth or are they bullshitting you?
> THE COURT: Load of shit, for the record, that's what this sounds like. (7 RR 14);
> THE COURT: You are not in the business of setting up narcotics buys. In 1972 to 77' the narcotics officers at that time documented everything they do. They try to record it as well, if possible. They at least have a witness to check the guy before he goes in, make sure he's got the drugs or the money and comes out and checks him when he comes out, the money is gone and the drugs are there. All is so basic. That's basic. (7 RR 18);
> THE COURT: So difficult to believe, Wesley. I am sorry. Sounds like a total crock. (7 RR 20);
> THE COURT: I will listen to your officer's fairy tale. (7 RR 22);
> THE COURT: Their credibility is a little bit suspect here. I am going to make that ruling. I am going to say that right on the record. (7 RR 26);
> THE COURT: I have got to tell you that my bullshit meter is pegging out right about now. (7 RR 27);

> THE COURT: This stinks to high heaven and the fact finder considering capital murder should know how bad it stinks. (7 RR 32);
> THE COURT: That's the worse police work that I ever heard of. If anybody ran their operation like that when I was a policeman, they would be out the door in a heartbeat." (7 RR 33).

Further, during the pretrial hearing following the *in camera* hearing, the trial court made the following statements in regard to the insincerity of the State claiming that they do not know the identity of the informant:

> "THE COURT: Well, that's what we were told. No one knows what the truth is. (9 RR 7).
> THE COURT: I'm not sure they were honest to be honest with you. (9 RR 9).
> THE COURT: Well, the problem is that you originally tried to mandamus me, tried to keep the identity of the informant secret, and then it turns out—and then when that doesn't work out, or it didn't happen—
> THE COURT: Well, now you're saying, Well, we don't know who he is.
> THE COURT: First we want to protect his identity and then now we don't know who it is. And I'm curious how your office could get in that situation unless the police lied to you." (9 RR 23).

Moreover, the trial court was so concerned about the State's inconsistent actions and testimony that the trial court had the Texas Rangers investigate the HCNTF. (10 RR).

This Court has made clear that "an appellate court **must** review the trial court's ruling in light of what was before the trial court at the time the ruling was made." *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex.Crim.App. 2000). However, the Third Court of Appeals found that the trial court

abused its discretion below without ever once considering that at the time of the finding, the trial court believed that the State provided the trial court with untruthful testimony. *Id*. It is important to note that the record of the *in camera* hearing when read in conjunction with the email correspondence between the Commander of the HCNTF and the State, provided after the hearing, confirms that the trial court's original assessment that the State refused to provide truthful information to the trial court during the *in camera* hearing was correct. (2 RR 13-19); (1 SCR 3). Lerma contends that a trial court should not be found to abuse its discretion in this unique situation, where the State refused to disclose any information to the trial court; for it is impossible for a trial court to meet any rational standard regarding what information an informant can provide to the defense if the State does not supply any information. (2 RR 13-19); (1 SCR 3).

In the Third Court's opinion, the court relies heavily on the Corpus Christi Court of Appeals case, *State v. Sotelo*; however, *Sotelo* is distinguishable from the facts in Lerma's case. *State v. Sotelo*, 164 S.W.3d 759 (Tex.App.- Corpus Christi 2005). In *Sotelo*, the defendants requested that the informant's identity be disclosed, claiming that he was a "witness in favor of the defense," and that "the informant participated in the alleged offense, was present both at the time of the alleged offense and at the time of

arrest, and was a material witness on the issue of culpability." *Id*. at 761. It is unclear if an *in camera* hearing was actually conducted in *Sotelo*, but regardless, the record in *Sotelo* affirmatively established that the informant was not actually present at the scene at the time of the search and arrest, defeating the Defendants' theory on how the informer could provide favorable testimony. Id. at 761-762. However, the trial court in *Sotelo* still ordered disclosure of the informant, and dismissed the charges after the State refused to identify the informant. *Id*. at 761.

Additionally, the trial court in *Sotelo* never actually formally made the finding that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence, unlike Lerma's case, where the trial court actually made the proper finding. *Id*. at 762. Moreover, the trial court in *Sotelo* ordered disclosure based on the Defendants' speculative theories that were affirmatively refuted by the testimony of law enforcement and after law enforcement ***actually provided*** an identity. *Id*. In contrast, in Lerma's case, the HCNTF Officers all conceded that the defensive theory that the shooter knew the deceased was an informant, and had a motive to kill the deceased, was a viable theory. (1 SCR 6). More importantly though, the HCNTF Officers also intentionally did not disclose the identity of the CI, making it impossible for Lerma's

theory of how the informant could provide helpful testimony to be refuted or confirmed. (1 SCR 6). Equally though, Lerma would contend that even a layperson would understand how the motive of the actual shooter in Lerma's case, who has never been charged with a criminal offense, could be potentially relevant to the guilt or innocence of Lerma during a jury trial. (1 SCR 6).

As articulated by this Court in *Bodin*, "no fixed rule could be formulated as to when identity has to be disclosed. Rather, the public interest in protecting the flow of information has to be weighed against the accused's right to prepare a defense." *Bodin v. State*, 807 S.W.2d 313, 316 (Tex.Crim.App. 1991). The legislative intent behind TRE 508 is not only to protect confidential informants and the State's ability to utilize such informants, but also to protect the rights of the accused. *Id*. The legislature contemplated the very sensitive and competing interests involved with confidential informants when enacting TRE 508, and this is precisely why the remedy for dismissal is included in TRE 508. *Id*. Further bolstering the great importance of the remedy for dismissal contained in TRE 508, is the fact that a trial court generally does not have the power to dismiss a case under the vast majority of situations found in our criminal justice system.

In conclusion, Lerma would respectfully caution that affirming the

court of appeals' holding will have grave consequences not only for criminal defendants, but for criminal informants as well. To give law enforcement a pass on allegedly not knowing the identity of an informant puts all informants in danger of being disappeared. As the Court is well aware, to be a criminal informant is a very dangerous role, and if law enforcement doesn't know an informant's identity, they certainly cannot ensure that person's safety. More importantly, if the Court allows the Third Court of Appeals' ruling to stand, there is nothing to stop the HCNTF, or any other law enforcement agency in the State of Texas, from simply claiming that they do not know the identity of the confidential informant after a trial court has ordered them to disclose the identity under TRE 508. Obviously, this is an ideal loophole for law enforcement, and one that will unquestionably be utilized by bad actors looking to circumvent the law.

For these reasons, Lerma would ask the Court to reverse the court of appeals' opinion, as Mr. Lerma would contend that the trial court did not abuse its discretion in making such a finding, or in the alternative, remand the case to the court of appeals, directing the court of appeals to at least consider the State's deceitfulness in conducting the standard of review.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Lerma prays the Honorable Court will reverse the opinion of the Third Court of Appeals, and/or remand the case to the Third Court of Appeals to decide whether error was preserved, and/or whether the trial court abused its discretion where the record is clear that the State was dishonest with the trial court.

Respectfully Submitted,

/s/ Josh Erwin

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CERTIFICATE OF SERVICE

Pursuant to TEX. R. APP. P. 9.5, I certify that on January 9, 2020, a copy of this pleading was electronically served to the following:

Wesley Mau, District Attorney of Hays County, Texas, at wes.mau@co.hays.tx.us

The State Prosecuting Attorney of Texas, at information@spa.texas.gov

/s/ Josh Erwin

Josh Erwin

CERTIFICATE OF COMPLIANCE STATING NUMBER OF WORDS IN BRIEF

This pleading complies with Tex. R. App. P. 9.4. The Appellee certifies that this pleading contains only 9,224 words, and is therefore compliant with the maximum word limitation allowed by the Honorable Court.

/s/ Josh Erwin

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Josh Erwin